INFORMATION

FOR

ARCHIBALD TAIT, Suſpender.

AGAINST

The Right Honourable the Earl of ROSEBERIE, Charger.

THE queſtion now before your Lordſhips, is produced by an action raiſed at the inſtance of the Earl of Roſeberie, againſt the informant. The action is of a criminal nature, and inſiſted in before the juſtices of peace, for the county of Linlithgow, who have proceeded ſo far as not only to take a proof, but even to pronounce a ſentence inflicting corporal puniſhment of a very ſevere nature upon the ſuſpender. Theſe proceedings have been removed into this court by bill of ſuſpenſion, the defender having objected both to the competency of the court where the action was originally brought, to try the matter contained in the libel, and to the form of their proceedings, which he contended were altogether irregular and illegal.

After various papers had been wrote by both ſides on this ſubject, your Lordſhips appointed a hearing, and afterwards you pronounced the following deliverance; 'The Lords Juſtice Clerk and Lords 'Commiſſioners of Juſticiary, having heard parties procurators, They 'ordain them to give in informations upon theſe points, *viz.* How 'far juſtices of peace, have a juriſdiction to try the crime charged 'in the original complaint, exhibited againſt the ſuſpender; and 'ſecondly, whither they could proceed in ſuch complaint without

'calling a jury; ordain theſe informations to be printed, and given 'in to the clerk of court, in order to be recorded, *&c.*'

In obedience to this order, the preſent information is given in on the part of the ſuſpender, and in order to treat the firſt queſtion mentioned in your Lordſhips deliverance, *viz.* How far the juſtices of peace have a juriſdiction to try the crime charged in the originally complaint, it will be neceſſary in the firſt place, to conſider the nature of the charge contained in the libel, and what crime it properly ſpeaking amounts to, in order to which, it will be neceſſary to reſume the charge contained in the libel itſelf.

The original complaint is in the name, not only of the Earl of Roſeberie, but of the procurator-fiſcal of court, and is ſigned by the procurator-fiſcal: It ſets, furth in the major propoſition, 'That 'whereby, the laws of this and every other well-governed realm the 'felonioufly abſtracting and diſpoſing upon any perſons property 'and applying the money ariſing therefrom, to their own uſe, are 'crimes of a high nature, and ſeverely puniſhable: and ſuch crimes 'are highly aggravated, when committed in breach of truſt, by a 'ſervant, whoſe buſineſs it is rather to protect their maſters proper-'ty, than to embezel and alienate it to his prejudice;" Here, though the words ſtealing or theft, are not ſpecifically made uſe of, yet the charge can admit of no other conſtruction, than that of the crime of theft, for the words '*felonioufly abſtracting* and diſpoſing u-'pon any perſons property, and applying the money ariſing there-'from to their own uſe,' is preciſely the defininition of theft in the civil law, *fraudulofa contractatio rei alienæ animo lucri faciendi.*

The minor prepoſition ſets furth, that the ſuſpender had at different times, in a felonious manner, abſtracted and diſpoſed upon to different perſons, conſiderable quantities of hay, corn, and ſtraw; and after ſpecifying ſome particulars, the libel proceeds thus, 'That 'beſides theſe fellonious or *theftuous* practices above mentioned, 'the ſaid Archibald Tait, did about the term of Whitſunday laſt, 'abſtract from the complainers ſaid farms, at Ochiltree, and diſpoſe 'of to the ſaid John Finlayſon, about three bolls of oats, the pro-'perty of the ſaid complainer, and applied the money ariſing there 'from to his own uſe; at leaſt, the ſaid Archibald Tait, during the 'time foreſaid, hath been guilty art and part of *theftuouſly* abſtract-'ing from the complainers ſaid farms, at Ochiltree, and diſpoſing 'of at different times; within the time foreſaid, conſiderable quan-'tities of hay, corn, and ſtraw, the property of the private com-'plainer: By all which *different acts of theft*, committed in breach 'of truſt as aforeſaid, the private complainer hath ſuffered conſide-

'rably;'

'rably;" here the words theftuous, thieftuouſly, and acts of theft, leave no doubt concerning the nature of the charge, and that it was for the crime of theft, the ſuſpender was tried.

The lybel contains the ordinary criminal concluſions, and the ſentence pronounced by the juſtices, was in the following words, 'Linlithgow, May 13th 1774. The juſtices having conſidered this complaint, defences offered thereagainſt, with the proof adduced, and books and writes produced: Find, the defender Archibald Tait, guilty of embezeling oats, hay and ſtraw the property of the Earl of Roſeberie, under the defender's truſt; and therefore grant warrant to the conſtables, to carry the ſaid Archibald Tait, from the bar of court, to the tolbooth of Linlithgow, the keepers whereof, are hereby ordered to receive and detain him therein, untill Friday next the twentieth current, and ordain the ſaid Archibald Tait, at eleven o'Clock of the forenoon of that day, to be carried by the conſtables from ſaid tolbooth to the pillory, at the market croſs of Linlithgow, and to ſtand thereon bare-headed, untill this ſentence is audibly read over in his preſence, and from thenceforth, the juſtices baniſh him this county for life, with certification, if he is found within the county, at any time after the 10th day of June next, he will be apprehended, and the juſtices grant warrant, to apprehend him accordingly, and to incarcerate him in the tolbooth of Linlithgow, for the ſpace of one month, and to be publicly whipt through the town of Linlithgow, on each market day, during that month, and thereafter to be rebaniſhed, and they appoint the like impriſonment and whipping, to be repeated as often as the ſaid Archibald Tait, ſhall be found within the county, and decern accordingly.'

In order to determine, whether theſe proceedings, fell under the powers of the juſtices of peace, it will be neceſſary to look back, on the origin and hiſtory of that ſpecies of magiſtrates in the law of Scotland.

On conſidering this point, it will be found, that the juſtices of peace, are not of that claſs of judges ordinary, which being creatures of the common law, and of an inſtitution beyond the memory of record, are conſidered as coeval with the law itſelf, and to poſſeſs an unlimited juriſdiction over all ſpecies of actions, that are conſiſtent with the nature of their juriſdiction, either criminal or civil, ſuch as are ſheriffs, magiſtrates of burrows, *&c.* for where the law does not appear, to have expreſsly limited the cognizance of any queſtion to particular courts, they are allowed to take them under their cognizanc

nizance, by virtue of general powers, ſuppoſed to be veſted in them by the law.

The creation of juſtices of peace, is within the memory of record, of no very ancient date; they are the creatures of ſpecial ſtatute, which at the ſame time that it erected the office, did alſo with preciſion, define the extent and limits of their juriſdiction, declaring in what cauſes they ſhall decide, and having given them no general powers, they cannot exceed the ſpecial ones, that the law has devolved on them.

It is of material conſequence therefore, to conſider the laws, by which the office of juſtice of peace has been introduced into this country, the deduction of which is not an unpleaſant, though for a long time, a much unattended to part of our law.

In ancient times, the whole criminal juriſdiction of Scotland almoſt, veſted in the juſtice-general and his deputes, the original judges of that court, in which your Lordſhips now ſit. A very conſiderable degree of criminal juriſdiction, however, was veſted in other judges, ſuch as Lord of Regality, Barons, either with, or without pit and gallows, and ſheriffs, the laſt two ſpecies of juriſdictions, being ſubject to the reviſal of, and appeal to the juſticiary, and the former excluded in the caſe of pleas of the crown, and hampered by the conditions annexed to the right of repledging.

The heretable juriſdictions, became odious, at a very early period in the law of Scotland, and long before they were ſo much multiplied as they afterwards were, much to the prejudice of the liberty of the ſubject, and much to the gratification of the private paſſions of landed proprietors. They were odious to the people, on account of the oppreſſion they ſuffered from the partiality of the judges that ſat in ſuch courts, and they were odious, even to the crown, when the meaſures of adminiſtration were directed, by ſuch as could coolly and deliberately reflect on the various operations of government, and their effects, upon the welfare of the ſtate, though it too often happened, that the influence of favourites, or the neceſſities of the crown, became paramount to all principles of ſound policy, and multiplied thoſe miſchievous juriſdictions, at the requeſt of individuals, in ſpite of a ſyſtem that never ſeems to have been totally out of the view of the officers of the crown, and of parliament, to reduce them within very narrow bounds.

The office of juſtices of the peace, had been very early known in England, it is ſaid, that there were conſervators of the peace, whoſe original appointment goes beyond the memory of record in that kingdom,

dom, and therefore originated from the common law. Lord chief Juſtice Coke, in his ſecond inſtitute, commenting on the *articuli ſuper chartas*, which was an act in the 28th Edward I. p. 558, tells us, 'Of ancient time, before the making of this act, ſuch officers or 'miniſters, as were inſtituted either for preſervation of the peace 'of the county, or for execution of juſtice, becauſe it concerned 'all the ſubjects of that county, and they had a great intereſt in juſt 'and due exerciſes of their ſeveral places, were by force of the 'king's, writ in every ſeveral county, choſen in full or open county, 'by the free-holders of that county; as before the inſtitution of 'juſtices of peace, there were *conſervatores pacis* in every county, 'whoſe office (according to their names) was to conſerve the king's 'peace, and to protect the obedient and innocent ſubjects from 'force and violence. Theſe conſervators, by the ancient common 'law; were, by force of the king's writ, choſen in full and open 'county *de probioribus et potentioribus comitatus, &c.* by the freehol-'ders of the county, after which election, ſo made and returned, 'then in that caſe, the king directed a writ to the party ſo elect-'ed.'

In the ancient periods of our law, there were few material inſtances of ſound legiſlation in England, that were not followed in Scotland, as ſoon as circumſtances would permit; though, ſometimes, a conſiderable tract of time paſſed over before ſuch circumſtances occured; and there are not wanting inſtances, where England followed the example of ſound principles of legiſlation, that had originated in Scotland. This was by no means wonderful, as a very ſingular ſimilarity occurs, in the firſt principles of law, in both countries, in ſomuch, that if hiſtorical narration did not furniſh the moſt irreſiſtable documents to the contrary, one would be apt to believe, that both ends of the iſland had been originally ſubject to the ſame legiſlative authority.

Scotland was greatly embroiled, for many ages. During theſe broils, the feudal juriſdictions could not fail to gain ground; becauſe they were connected with the influence of military force, which was alſo in thoſe days feudal; and, the inſtitution of ſuch an office, as that of conſervators of the peace, was too humiliating to the independancy, or, perhaps, to ſpeak more properly, the tyranny of feudal chieftains to be readily adopted.

During the reign of James VI. however, Scotland had ſome reſt; and, though the politics of that prince are by no means to be admired, in general, he ſeems invariably to have perſiſted in one ſound idea of humbling the power of the feudal ariſtocracy. He meant it, in-

 deed,

deed, to enlarge his own prerogative, and not to favour the liberty of the ſubjects, for every diminution of the inheritable powers of feudal juriſdictions, was, in fact, an acceſſion to the ſupereminent power of the crown.

During this reign, it was, that ſome thing ſimilar to the office of the converſators of the peace in England, was introduced in Scotland by the ſtatute 1587. c. 82. This ſtatute, when conſidered in its whole detail, is a pretty remarkable one. Without deviating from the terms of the law of Scotland, it, in the *firſt* place, appears to have meant to introduce circuits in Scotland, after the example of the Engliſh circuits, by ſpecial commiſſions from the king, for the tryal of crimes of material importance; and, in the *ſecond* place, to erect county courts, under the denomination of *commiſſioners of juſtice*, who were to ſit by commiſſion from the king; likewiſe, for the tryal of crimes of an inferior nature. As this ſtatute is a very material one, for diſtinctly underſtanding the ideas of criminal juriſdiction, at that time entertained in Scotland, the ſuſpender will uſe the freedom to recite it pretty particularly.

It would appear from the preamble, that the office of juſticiar or juſtice general, had, at that time, been executed in a very remiſs manner in Scotland; in ſo much, that the juſtice general, and his deputes, had neglected to perform their circuits regularly, and had brought all criminal buſineſs to Edinburgh. The preamble, which ſets this forth, is in theſe words, 'Becauſe of the great delay in actiones criminal, throw the not halding of juſtice aires, twiſe in the zeir, according to the auncient and lovable ordour, eſtabliſhed by diverſe gude lawes, and actes of parliament, maid of before: Conſidering the ordinar judgement in criminal cauſes is onely now at Edinburgh, quhair particular diettes ar ſett for certaine ſpecial and higheſt crimes, the puniſhment of uther offences, quhairby the common-weil is greatly grieved, left to the juſtice aires, that very ſendill haldis, and therethrow are becume contemptible: Therefore, and for eaſe and reliefe of the ſubjectes, that ar ſa frequently inquieted, be cumming in convocation to dayes of law, and to paſs upon aſſiſes in Edinburgh, quhair the courtes ar oft times continued in hinderance of juſtice, and to the great trouble and needeleſs expenſes of the king's lieges; it is ſtatute,' *&c.*

The act then proceeds to appoint two circuits in the year, to be held in the months of April and October; for which purpoſe, the juſtice general is appointed to make eight deputies, or elſe the king is to grant a commiſſion, under the teſtimonial of the great ſeal, to ſome of the ſenators of the college of juſtice, or certain well experimented

mented advocates, that are moſt able to travel, appointing two over every quarter of the Realm, with a deputy of the Treaſurer's, and another of the Juſtice Clerk's. The form of their proceeding is pointed out by the ſtatute; but, as this part of the act has no concern with the preſent queſtion, the ſuſpender ſhall not enter upon that, having mentioned this inſtitution only hiſtorically.

The act then proceeds to what is more materially connected with the preſent queſtion: And, on this head, it ſays, that 'It is ſtatute 'and ordained, that our Soveraine Lord, with adviſe of his Chancel-'lar, Theſaurer, Juſtice Clerk, ſall nominate, and give commiſſi-'on to honourable and worthie perſons, being knawen of honeſt 'fame, and eſteemed, na mainteiners of evill or oppreſſion; and in 'degreee, Earles, Lordes, Barronnes, Knights, and ſpecial gentle-'men, landed, experimented in the lovable laws and cuſtomes of 'the realme, actual indwellers in the ſame ſhires, to the number 'hereafter limited, according to the boundes and quantity of every 'ſchire.' The act then proceeds to ſpecify the number, being ſeven fourteen, or twenty one, from each ſhire, as particularly mentioned in the act; and then it declares, "whilks ſall be the King's com-'miſſioners, and juſtices, in the furtherance of juſtice, peace, and 'quietneſſe; togidder with four of the councell of every burgh, with-'in the ſelfe, quhilks ſall be conſtant and continual uptakers of 'dittay. Givand, grantand, and committand to them, full power 'to take inquiſition, and make dittay, be their awin knawlege, or 'be an ſworne inqueſt, or ſworne particular men, of all perſones ſu-'ſpected culpable of the crimes and defaultes contained in the 'table, to be maid be the theſaurer, juſtice clerk, and advocate, 'annexed to this preſent act, divided in twa ſortes: And all per-'ſons, delated as culpable in the firſt degree, the ſaids judges and 'commiſſioners, ſall ather apprehend, and committ to waird (gif 'conveniently they canne) or elſ, ſall deliver them in the portuous, 'to the crowner of the ſchire, every moneth, anis, to be arreiſted 'and put under ſoverty be him; or his deputes, to the nixt juſtice 'aire, to be halden twiſe in the year, be the kings juſtices deputes, 'directed from his hieneſſe, in manner before ſpecified: And, up-'on all perſons delated, and ſuſpected as culpable of the uther crimes 'and defaultes in the ſecond degree, the ſaids juſtices, and com-'miſſioners in the ſchires, ſall proceede and do juſtice themſelves, at 'their courtes and meetinges, to be kept four times every zeir; that 'is to ſay, at the firſt day of Maii; at the firſt day of Auguſt; at the 'firſt day of November; and, at the firſt day of Februar; or uther-'wayes, at ony time: Three thereof, then being togidder, alwayes ſit-

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'ting in the tolbuith of the head burgh of the ſchire; and that they 'remaine at every ane of the ſaids four times in the zear, three days 'togidder, or langer or ſhorter as they finde occaſion, with power 'to them to direct their precepts and portuous, to the crowners; 'and their precepts to ſchirreffes, or officiars of armes, *to ſummound 'aſſiſes ilk perſon under the paine of ten poundes.*'

In this appointment, your Lordſhips will perceive the original idea of juſtices of peace, and even of quarter ſeſſions; and, what is moſt material to obſerve in the preſent cauſe, and will fall to be more particulary taken notice of afterwards, you will obſerve likewiſe, that they are impowered to direct their precepts to ſheriffs, or officers at arms, to ſummon aſſizes; from which it appears, that the trials were meant to be by jury, and no otherwiſe.

The juſtices, or commiſſioners to be appointed by virtue of this ſtatute, were to have juriſdiction, only to determine ſuch cauſes as ſhould be held to be of an inferior degree of criminalty; which cauſes were to be ſet forth in a table to be made up by the treaſurer, juſtice clerk, and advocate, and which was to be annexed to the act; but, as no ſuch table is found annexed to the act, it is highly probable, that this inſtitution, however wiſely calculated, never took effect; and this is the more probable, that, in the ſame reign, there appears other acts, relative to juſtices of peace, which are, in reality, new eſtabliſhments.

By one of theſe, *viz.* the ſtat. 1619, c. 7. entitled, 'act a-'nent the commiſſioners and juſtice of peace,' after a preamble full of very fulſom adulation to the king, and of very conſiderable length, it is ſtatute and ordained, 'That in every ſchyre within 'this kingdome, there ſhall be yearlie appoynted, by his majeſtie, 'ſome godlie, wyſe, and vertuous gentlemen, of good qualitie, 'moyen and report, making reſidence within the ſame, in ſik num-'ber, as the boundes of the ſhyre ſhall requyre, to be commiſſioners 'for keeping his majeſtys peace; to whom his majeſtie, with advyce 'of the lords of his privie councell, ſhall give power and commiſſion, 'to overſee, try, and prevent all ſik occaſions, as may breed trouble 'and violence amongſt his majeſtys ſubjects, or forceable contempt 'of his majeſty's authoritie, and breach of his peace; and to com-'mand all perſons, in whom they ſhall ſee manifeſt intention to 'make trouble or diſorder, either by gathering together of idle and 'diſorderlie perſons, or by public bearing or wearing piſtolets or o-'ther forbidden weapons, and ſik other ryotous and ſwaggring be-'haviour, to binde themſelves, and find caution, under competent

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'paines, to obſerve his majeſties peace, and for their compearance before 'his majeſties juſtice or lords of his privie councell, to underly ſik order as 'ſhall be found convenient, for puniſhing their tranſgreſſions, or ſtaying 'of troubles and enormities; and, if need ſhall be, to requyre the dutiful 'and obedient ſubjects of the ſhyre to concurre with them, in prevent-'ing all ſik contempts and violences, or for taking or wairding of the 'wilfull and diſobedient authors, committers, and foſterers of theſe 'crymes and diſorders, under ſik competent arbitrare paines, as his 'majeſtie and lords of his privie councell ſhall appoynt, for the offen-'ders; and ſik of the countrie, as being requyred, ſhall not give their 'readie and a fald concurrance to his majeſties commiſſioners, in the 'premiſſes, whereby the ordinare magiſtrates, and officiares within 'the ſhyres, may be the better aſſiſted, and their abſence, imploy-'ments, or other impediments mair commodiouſlie ſupplied, with-'out derogation of their juriſdiction, or want of readie comfort and 'juſtice to the obedient ſubjects within the bounds thereof; ordein-'ing alſo the ſaids commiſſioners, to give true advertiſement and 'information, to the lords of his majeſties privie councell, juſtice-ge-'nerall, and his deputes; his majeſty's theſaurer, and other magi-'ſtrates and officers whom it effeirs, of the names of ſik faithful 'and unſuſpect witneſſes and aſſyſers, to be ſummoned in all crymes 'and diſorders, whilk ſall happen to fall forth within the ſaids ſhyres, 'as ſhall be knawn to be maiſt meet and able for tryell and proba-'bation of the ſame, and for eſchewing, that ſik as are either aged, 'ſeiklie, or unable to travell, or ignorant of the facts to be tryed, 'be not unjuſtlie vexed, or unneceſſarlie drawne from their awne 'houſes and affaires, for matters wherein they are not able to give 'any light.'

It ſeems that the king had given inſtructions to theſe juſtices, reſpecting the nature of their office and juriſdiction, but that doubts had occurred concerning the authority of theſe inſtructions; ſo that it became neceſſary to have them ratified and confirmed by act of parliament. In conſequence of this, the ſtatute 1617, c. 8. appears to have been made; the preamble to which is in the following words: 'Our ſovereign lord, with advice and conſent of the 'eſtates of parliament, having conſidered the articles and inſtructi-'ons given of before by his majeſty, to the juſtices and commiſſio-'ners, appointed for keeping of his majeſty's peace, and to their 'conſtables, which were preſented to his higneſs, and unto the ſaid 'eſtates, by the ſaids juſtices, and deſired to be authoriſed by de-'creet and ſentence of parliament, has ratified and confirmed the 'ſame, in manner as they are particularly here ſet down and ex-

'preſſed, in every point and article thereof, of which the tenor fol-
'lows, *&c.*'

The opinion of the legiſlature concerning this act, whither it was a temporary or perpetual one, appears to have been different at different times. By the ſtatute 1633. c. 25. it is ratified, approved, and confirmed, and power is given to the privy council, to impoſe penalties on juſtices, for their non attendance at the quarter ſeſſions, and alſo to enlarge and amplify their powers, as the council ſaw fit; declaring, that whatever the privy council did, in this matter, ſhould have the force of an act of parliament; ſo that the legiſlature, at that time, ſeems to have been of opinion, that the act was perpetual.

In the time Charles the II, however, a different idea ſeems to have prevailed, *viz.* That the act had been only temporary, and was expired; for, in the year 1661, there was an act made, entitled 'commiſſion and inſtructions to the juſtices of peace and conſta-
'bles. The act is c. 38. of that year, and the preamble to it is in
'the following words: 'Our ſovereign Lord, taking to his royal con-
'ſideration, how much the appointing of juſtices of peace, and
'conſtables, within all the ſhires of this kingdom, under the reign
'of his majeſty's royal preceſſors, did contribute to the peace, quiet,
'and good government thereof, and to the ſpeedy and impartial
'execution of law and juſtice, to all perſons ſubjected to their juriſ-
'diction and power: Therefore, and for the furtherance of theſe
'ends in the future, his majeſty, with advice and conſent of the
'eſtates of parliament, doth hereby ſtatute and ordain, that, in all
'time comming, there ſhall be juſtices of his majeſtys peace ap-
'pointed, within each ſeveral ſhire of this kingdom, to be nomi-
'nate from time to time by his majeſty, and his royal ſucceſſors;
'which juſtices of peace are hereby impowered to adminiſtrate juſ-
'tice, and put his majeſty's laws in execution, according to the
'particular inſtructions aftermentioned, *&c.*

It is, however, a matter of no importance, whether the ſtatute of James VI. was perpetual or tempory; for this act of Charles II. muſt now be conſidered to be the rule; and, as the inſtructions it contains are very little different from thoſe in the ſtatute of James the VI. only more diſtinct and explicit in ſome points, the two ſtatutes may, in effect, be conſidered as the ſame.

Theſe being the ſtanding inſtructions for juſtices of peace, according to the law of Scotland, it will be proper to conſider the matter they contain, with ſome degree of accuracy. They are divided into ſeparate articles, and the ſuſpender ſhall reſume thoſe articles,

barely

barely ſtating thoſe that are foreign to the preſent queſtion, but reciting, ſomewhat more particularly, thoſe that give any ſpecies of juriſdiction, in order that the full extent of the juriſdiction may more diſtinctly appear.

The *firſt* article appoints the form of an oath of alledgiance, and oath *defideli*.

The *ſecond* article appoints the days of the quarter ſeſſions; in which ſeſſions, it is ſaid, 'They ſhall adminiſtrate juſtice to the people, in 'things that are within their juriſdictions, and puniſh the guilty, 'for faults and crimes done and committed in the preceeding quar-'ter; and, by mutual and conjunct advice, make and rectify ordi-'nances, for the fies of ſervants, ſhearers in harveſt, and other la-'bouring men, appoint prices for all handy-crafts, elect or continue 'conſtables, or other officers, and diſpoſe of the fines and mulcts, 'for payment of the conſtables, clerks, and other officers fees, 'and employ the remanent, on ſuch neceſſary and pious uſes, as 'they ſhall find moſt expedient; and ſhall have power to coutinue 'the ſaid ſeſſions, or to adjourn the ſame, to ſuch days and places 'as ſhall be moſt convenient.'

Though, in this article, the words *puniſh the guilty for faults and crimes done and committed in the preceeding quarter*, ſeem to be general, and might at firſt ſight, be conſtrued to give a very indefinite degree of criminal juriſdiction, yet, from the nature of the thing, that cannot be the caſe, as the words, taken in an unlimited ſenſe, are broad enough to take in all ſort of crimes, even thoſe of a capital nature, and the pleas of the crown; which, however, is a conſtruction, that hath never been put upon them; and, as particular powers are afterwards given them, in the ſubſequent part of the ſtatute, the general words muſt be conſtrued, as limited to thoſe ſpecial powers; and their criminal juriſdiction, given them, in this article, explained as is particularly done with regard to their civil juriſdiction, *viz.* That they are to puniſh for faults and crimes, in things that are within their juriſdiction, given them by the ſubſequent clauſes of the ſtatute.

The *third* article relates to the form and power, of binding over to the peace.

The *fourth* article regulates the method of proceeding, for contempt of authority, in caſe of refuſal to appear before them.

The *fifth* and *ſixth* articles, give them a controul over the ſheriffs and baron bailies, in ſome particulars, as to the due execution of their office, by informing the privy council of certain abuſes.

The *ſeventh* article gives the juſtices a juriſdiction to puniſh riots,

and

and likewiſe appoints the form of procedure, with reſpect to riots. The words of this clauſe are; 'The ſaids juſtices, ſhall hereby have 'power to proceed upon all perſons, committing riots and break-'ing the king's peace, under the degree of noblemen, prelates, 'chancellors, and ſenators of the College of Juſtice, and to puniſh 'and fine, according to the quality of the crime, and the eſtate of 'the offender; and, if any of the ſaids perſons, being charged to 'compear before the ſaids juſtices, ſhall diſobey, the ſummons be-'ing indorſed, the lawful citation being verified, and fact proven, 'the juſtices ſhall puniſh and fine the not compearing, according 'to the quality of the crime, and eſtate of the offender; and, for 'the more clear determination of the order, which ſhall be kept by 'the ſaids commiſſioners, in the deducing of any ſuch proceſs, our 'Soveraign Lord, with advice of his eſtates, declareth, that it ſhall 'be lawful to the ſaids juſtices, whenſoever they have any occaſion, 'to move any action againſt parties, for committing any like fact 'or riot, to refer the firſt ſummons to the parties oaths of verity, 'failing of other lawful probation; who, being perſonally ſummon-'ed by that firſt citation, ſhall be holden as confeſt, and decreet to 'be pronounced again him, conform to the libel and ſummons; 'and, if he be not perſonally ſummoned by the firſt citation, the 'ſaids commiſſioners ſhall be holden to cauſe ſummon him of new 'again, by a ſecond ſummons, at his dwelling place; which two 'citations ſhall be as ſufficient to infer decreet, and ſentence, upon 'the libel againſt him, as if he were apprehended perſonally; and 'which ſentence, given after the manner and form of probation 'above written, his majeſty, with advice foreſaid, authoriſes and 'ſuſtains, as good and lawful in themſelves.' In paſſing, it deſerves your Lordſhips particular attention, as to this article that the form of proceſs, thereby pointed out, is not a general one, reſpecting the whole criminal juriſdiction of the juſtices of the peace, but relates to their juriſdiction in matters of riot alone; an obſervation that ſhall not be farther deſcanted upon here, as the force of it is more felt in the other queſtion, now under the conſideration of your Lordſhips, *viz.* The propriety of the mode of trial, and whether it ought to be by jury or not?

The *eighth* article is in the following words: 'The ſaids commiſ-'ſioners ſhall put his majeſty's act of parliament to due and full exe-'cution, againſt wilful beggars and vagabonds, ſolitary and idle 'men and women, without calling or trade, lurking in ale-houſes, 'tied to no certain ſervices, repute and holden vagabonds; and a-'gainſt thoſe perſons who are commonly called *Egyptians;* and they

'ſhall

'ſhall puniſh and fine their reſetters, and ſetters of houſes to them 'accordingly, by ſuch competent pains as is proper for them to en- 'join.' In this article a very conſiderable degree of juriſdiction is given, particularly in that part of it relating to *Egyptians*, as to which, a very different trial muſt, by the neceſſity of law, take place, from that which was appointed for rioters in the laſt article.

The *ninth* article is in the following words: 'The ſaids commiſ- 'ſioners, and juſtices of peace, are hereby authoriſed and impower- 'ed, to give order (as they ſhall think moſt convenient, and with 'leaſt grief to the ſubjects) for mending of all highways and paſſages, 'to or from any market town, or ſea-port, within that ſhire, and 'ſhall call before them, all ſuch perſons as ſhall ſtrait theſe paſſages, 'or otherways, by caſting ditches or fulſies, through the ſame, ſhall 'make theſe highways, noyſome and troubleſome unto paſſengers, 'and ſhall puniſh and fine them, according to the quality of their 'offence: And, to the effect it may be known, of what breadth all 'common highways ſhould be to market towns, our ſoveraign Lord, 'with advice foreſaid, declareth, that the ſame ſhould be of twenty 'foot of meaſure, in breadth, at the leaſt; and where any are of 'longer breadth, they ordain the ſame ſo to remain, unaltered or 'ſtraitened, and that the ſaids juſtices maintain the ſame, with all 'other ways, from any town in the pariſh, to the pariſh churches, 'in the eſtate as they are, and where they find any neceſſity of o- 'ther ways from any town in the pariſh, to pariſh churches, they 'ſhall inform his majeſty's ſecret council thereof, who ſhall give 'them (after ſufficient information) their direction thereanent, ac- 'cording whereunto they ſhall be holden to proceed: And, if any 'perſon refuſe to concurr for mending of highways and paſſages, 'the ſaids juſtices ſhall have power to cenſure and puniſh them, ac- 'cording to their direction; with proviſion always, that, if in their 'proceedings herein, they uſe ſuch ſeverity or rigour, as may move 'juſt complaints againſt them, they ſhall be cenſured therefore, by 'his majeſty's ſecret council, as appertaineth.' This part of the ſtatute, is in a great meaſure, repealed, by the ſubſequent acts which have been made, relative to the care and reparation of the high roads, now veſted in the united bodies of juſtices of peace, and commiſ- ſioners of ſupply.

The *tenth* article provides, that, 'The ſaids juſtices ſhall put his 'majeſty's acts of parliament to execution, againſt cutters and de- 'ſtroyers of planting, green wood, orchyards, gardens, haynings, 'breakers of dove-houſes, and cunninghares, ſtealers of bees and 'bee-hyves, uſers of unlawful games, with ſetting dogges, ſlayers of

'red and black fiſhes and ſmolts, in forbidden time, foulers fouling 'in other mens lands, makers of muir-burn and moſſeburn, ſetters 'of crooes and nets, in watters and dames, having and keeping of 'crooes and yairs, in forbidden time; and ſhall proceed againſt 'them accordingly; and, for their better warrand to proceed in the 'premiſſes, it is his highneſs' pleaſure, that commiſſions be granted 'to the ſaids juſtices of peace, to try and puniſh the violators of the 'ſaid acts; in the tryal whereof they ſhall proceed by witneſſes, or 'by oath of party, and the puniſhment to be inflicted by them ſhall 'be a pecunial ſum, anſwerable to the circumſtances of the offence, 'and quality of the offenders; with ſpecial proviſions, that their 'cenſures and puniſhments ſhall extend againſt none, but thoſe a-'gainſt whom, by privilege of their inſtructions, they may lawful-'ly proceed.' Here, again, there occurs an inſtance of a particular mode of procedure being pointed out, with reſpect to particular crimes; a remarkable piece of evidence, that the following out this mode of procedure, was not at all underſtood to be the general rule of proceedings before the juſtices, but was to be adopted by them, only, in judging of particular crimes.

The *eleventh* article obliges the juſtices to inform the privy council, the treaſurer, and advocate, once a year of foreſtallers and regrat-ters, that order may be taken with them, conform to the acts of parliament; but no authority is given to the juſtices to proceed a-gainſt thoſe crimes themſelves.

The *twelfth* article impoſes particular penalties on inn-keepers, who reſett rebells at the horn, vagabonds, or perſons guilty of known crimes; and it authoriſes them to be puniſhed, in the firſt place, by the barons, and maſters of the ground, whereon they dwell, provided that is done within fifteen days after committing the fact; but, if they neglect to do it within that time, then the juſtices may proceed againſt them, but without prejudice of all acti-on, criminal or civil, competent of the law.

The *thirteenth* article directs them to inform the treaſurer and ad-vocate, of breakers of the act made againſt maltmakers.

The *fourteenth* article impowers them to make regulations, in time of plague, and to puniſh, ſeverely, thoſe that diſobey them.

The *fifteenth* article authoriſes the quarter ſeſſions, held in Auguſt and February, to regulate the ordinary hyre and wages of labourers, workmen, and ſervants, and to impriſon and puniſh thoſe who re-fuſe to ſerve; and alſo gives them a civil juriſdiction, for inforcing payment of ſuch wages.

The *ſixteenth* article orders them to inform the privy council,

where

where gaols are a wanting; and alſo appoints them to take notice that gaols be kept in repair.

The *ſeventeenth* article gives them power to make an aſſeſſment, for the maintenance of priſoners, committed for crimes, who are unable to maintain themſelves.

The *eighteen* article appoints all keepers of gaols to receive thoſe committed by the juſtices.

The *nineteenth* article gives them a power to ſet a price upon craftmens work; upon the ordiners of penny-bridals, together with the price of ſhearers fees; and to puniſh thoſe who ſhould contraveen the regulations

The *twentieth* article gives them a power of appointing ſingle and double ale to be brewed, naming viſitors for that effect; and to puniſh drunkeneſs.

The *twenty firſt* article declares three juſtices to be a quorum, in ordinary court.

The *twenty ſecond* article declares they are not ſubject to the execution of letters of caption.

The *twenty third* article names a commiſſion for regulating weights and meaſures, and appoints the juſtices to make trial of thoſe in uſe and inform the privy council where they find them diſconform to the ſtandard.

The *twenty fourth* article impowers the juſtices to apprehend thoſe who have contemned the cenſures of the church

The *twenty fifth* appoints them to be preſent at the quarter ſeſſions, give their oath to the bench, at their admiſſion, make their record, and make payment of the fines intromitted with by them, as juſtices of the peace, to the collector.

The *twenty ſixth* article orders them to appoint a ſufficient collector, for uplifting fines and penalties, and take ſecurity from him to account.

The *twenty ſeventh* article gives an allowance to the juſtices, for their attendance during the time of the ſeſſions, and impoſe a fine on thoſe who are abſent.

The *twenty eight* article authoriſes letters of horning, on fifteen days, to be iſſued for making effectual their fines, and orders no ſuſpenſion to be granted, but upon conſignation and caution for expences.

The *twenty ninth* article orders them, at the end of every ſeſſion, to ſend to the privy council, a catalogue of all ſuch perſons, as they either committed, or put under ſurety, with a ſhort abbreviate of the cauſe.

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The *thirtieth* article gives the following juriſdiction: 'The ſaid 'juſtices ſhall put in execution all acts of parliament, made for pu-'niſhing all perſons whatſoever, who ſhall curſe, or prophanely 'ſwear, or ſhall be mockers or reproachers of piety, or the exer-'ciſe thereof, and ſhall require and levy, upon every offender, the 'ſeveral penalties following, *viz.* of a nobleman, twenty pounds; 'each baron, twenty merks; gentlemen heritors or burges, ten 'merks; each yeoman fourty ſhillings; each ſervant, twenty ſhil-'lings ſcots money; each miniſter, in the fifth part of his years 'ſtipend, without prejudice to other proceedings againſt any 'ſuch miniſter for the ſame: And, in any of all the caſes be-'fore ſpecified in this inſtruction, the ſaid juſtices ſhall put in 'execution all ſuch laws, as for corporal puniſhments, as have 'any proviſions mentioned in them for ſuch caſes; and, in caſe of 'the inabilitys of the parties delinquents, to pay the ſum mention-'ed in this inſtruction, the ſaid juſtices ſhall put in execution ſuch 'laws, as for corporal puniſhments, as have any proviſions mentio-'ned in them for ſuch caſes; and, that the wives delinquents ſhall 'be puniſhed according to the quality of their reſpective huſbands, 'and that their huſbands be liable for the payment of their wives 'fines reſpectively, in manner above mentioned, *toties quoties*, for 'each fault; and all others whatſoever, not particularly herein no-'minate, are to pay in proportion to their reſpective qualities and 'degrees: And alſo, the ſaids juſtices are to put in execution, the 'acts of parliament made for the puniſhing of all perſons that ſhall 'be found guilty of the ſin of fornication, and that they levy, or 'cauſe be levied, the ſeveral pecunial ſums therein mentioned, *viz.* 'for each nobleman, for the firſt fault, four hundred pounds; each 'baron, two hundred pounds; each other gentlemen and burges, 'one hundred pounds; every other perſon, of inferior quality, ten 'pounds ſcots money; and that theſe penalties ſhall be doubled, '*toties quoties.*'

The *thirty firſt* article enacts, that the juſtices ſhall put the acts of parliament in execution, for the puniſhing of all perſons found guilty of the ſin of drukeneſs, or exceſſive drinking, eſpecially under the names of healths, or haunting taverns, or ale-houſes, after ten of the clock at night, or at any time of the day, excepting in time of travel, or for ordinary refreſhments; as alſo, againſt the keepers of the taverns or ale-houſes, that ſhall ſell the drink unto them.

By the *thirty ſecond* article it is provided, that the juſtice ſhall put in to execution, all acts of parlament, made againſt ſuch perſons as ſhall prefane the Lord's day, and require or levy the penalties herein contained.

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The *thirty third* article declares in what way the juſtices are to proceed, when one ſhall accuſe another; as guilty of treaſon, murder, or other felony, blaſphemy, inceſt, or any other henious crimes. It is remarkable, that this part of the law gave them no power to proceed themſelves to trial, it only authoriſes them to committ, or to take bail, to examine, and to take ſecurity for witneſſes appearing. As this article ſeems to be pretty material, in the preſent queſtion, the ſuſpender will beg leave to recite the words of the act it ſelf, in diſcribing the duty preſcribed to the juſtices on ſuch occaſions. The law ſays, in ſuch caſes,' ' the ſaid juſtice, or ' juſtices, ſhall forthwith cauſe ſuch perſon or perſons, to be appre- ' hended; and, after enquiry made in the cauſe, the ſaid juſtice, or ' juſtices, if they find cauſe, ſhall committ the defender to priſon, ' or take ſuffirient bail, if the caſe, by the law, be bailable; and ' ſhall take the information of the party accuſing, upon oath, and ' bind him to proſecute; and ſhall take the teſtimony or depoſition ' of the witneſſes, likewiſe upon oath, and bind them to give an e- ' vidence; and and ſhall alſo take the examination of the party ac- ' cuſed. All which recognizances, informations, depoſitions, and ' examinations, the ſaid juſtice, or juſtices, ſhall certifie to the next ' quarter ſeſſion, aſſizes, or criminal courts reſpectively, to the end ' the juſtice may proceed againſt them according to the law.'

The *thirty fourth* article mentions how the juſtices are to proceed, in caſe any nobleman, baron, or bailie, ſhould claim a right of repledging any perſon apprehended by them.

The *thirty fifth* article gives the juſtices power to take meaſures for the maintenance of the poor; and it preſcribes what they are to do upon that occaſion.

The *thirty ſixth* article impowers juſtices to call to account, thoſe who had acted in the capacity of juſtices of the peace, during the uſurpation, for the fines and penalties levied by them.

Theſe inſtructions contain the ſum of the powers veſted in juſtices of the peace, by the law of Scotland, anterior to the union; for, though in the time of James the VII. they were veſted with power to proceed againſt thoſe that frequented conventicles, and who were concerned in irregular baptiſms marriages, *&c* yet, thoſe powers were repealed at the revolution, after which the office of a juſtice of peace continued to be regulated by theſe inſtructions.

Having thus given a ſummary of the ſtatute, it would appear, that the criminal juriſdiction of the juſtices extends no farther, than the followi :g crimes; riots, cutting and deſtroying of planting, green wood, orchyards, gardens, haynins, breaking of dove-houſes

and cunninghares, ſtealing of bees and bee hives, uſing of unlawful games, with ſetting dogs, ſlaying of red and black fiſhes and ſmolts, in forbidden time, fowling on other mens lands, making of muir-burn and moſs-burn, ſetting of crooes and nets in waters and dams, having and keeping of crooes and yairs in forbidden time; as to all of which crimes, their mode of procedure is pointed out in the ſtatute itſelf, they being eſpecially empowered to proceed in theſe matters by the oath of party. The other crimes, concerning the mode of precedure in the tryal of which nothing in particular is pointed, out; are that the juſtices have power to puniſh all beggars and vagabonds; thoſe reputed as vagabonds and Egyptians; thoſe who refuſe to concur for mending the high ways, curſing and prophane ſwearing, mocking and reproaching piety, or the exerciſe thereof; fornication, drunkenneſs, keeping taverns and ale-houſes, reſorted to by drunkards; and prophanation of the lords day.

So ſtanding the law, the ſuſpender is adviſed, that, as the law of Scotland ſtood at the union, the juſtices of the peace had no power to puniſh any other crimes, than thoſe ſpecially above recited; and that, in particular, they had no juriſdiction to puniſh the crime of theft in general.

For, had it been meant to give them a general juriſdiction, as to this crime, there was no reaſon for giving them, in the tenth ſection, a particular juriſdiction for trying the breakers of dove-houſes and cunninghares, and ſtealers of bees and bee hives. If they could have tried great thefts, it would have followed of conſequence, that they could have tried thoſe petty ones; and the legiſlator, by giving them a ſpecial juriſdiction as to them, does, by implication, exclude their juriſdiction in thefts, of a more aggravated nature.

The *thirty third* article of the law demonſtrates ſtill more clearly, that it was not meant to give them a juriſdiction to try the crime of theft; for, there it is declared, that in caſe of accuſation of any heinous crime, or of any felony, they are not to try, but only to take precognition and ſecurities, and to tranſmitt theſe to the quarter ſeſſions, aſſizes, or criminal courts reſpectively, to the end the juſtice may proceed againſt them according to the law; by the appellation *the juſtice* here, is plainly meant, the juſtice general, or the court of juſticiary, where ſuch offenders were to be tried, and not by the juſtices of the peace. Theft undoubtedly comes under the the denomination of a felony, more eſpecially in ſuch a caſe as that contained in the preſent complaint, where it is explicitly ſaid, that the perſon complained on, *feloniouſly* abſtracted, *&c.* thereby, and in a ſpecial manner, bringing to trial explicitly for a felony.

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The complainer, diſtruſting the law of Scotland, on this head hath endeavoured to avail himſelf of the Britiſh ſtatute 6. *Annæ. chap.* 6. § 2. Which is in the following words: 'And to the end 'the public peace be in like manner preſerved, throughout the 'whole united kingdom, be it further enacted, by the authority a-'foreſaid, that, in every ſhire and ſtewartry, within that part of 'Great Britain called Scotland; and alſo, in ſuch cities, boroughs, 'liberties, and precincts, within Scotland, as her majeſty, her heirs 'or ſucceſſors, ſhall think fit, there ſhall be appointed, by her ma-'jeſty, her heirs, or ſucceſſors, under the great ſeal of Great Bri-'tain, a ſufficient number of good and lawfull men to be juſtices of 'the peace, within their reſpective ſhires, ſtewartries, citys, boroughs, 'liberties, or precincts; which perſons ſo appointed, over and above 'the ſeveral powers and authorities veſted in juſtices of the peace, 'by the laws of Scotland, ſhall be further authorized to do, uſe, 'and exerciſe, over all perſons within their ſeveral bounds, what-'ever doth appertain to the office and truſt of a juſtice of peace, by 'virtue of the laws and acts of parliament made in England, before 'the union, in relation to, and for the preſervation of the publick 'peace.'

This act, however, it is humbly apprehended, can never be underſtood in ſuch a ſenſe, as to enlarge the juriſdiction of the juſtices of peace, in Scotland, in ſuch a manner, as to enable them to try the crime of theft; for the whole powers of juſtices of peace in England, are not given them, but only thoſe powers that relate to, and for the preſervation of the public peace; an expreſſion that never would have been uſed, if an indefinite degree of authority had been meant to be given, after the example of the Engliſh juſtices; on the contrary, a power would have been given to Scots juſtices, to try all felonys and other crimes, that the Engliſh juſtices are authoriſed to try.

Accordingly, the legiſlator appears to have conſidered this act in no other view, than as giving powers of police to the juſtices, rather preparatory to the bringing of trials, than judicial, for carrying them on. This appears from the ſtatute, 8*vo. Annæ chap.* 16. § 3. and 4. Which are in the following words: 'Whereas, by an act made in 'the ſixth year of her majeſty's reign, entitled an act for the ren-'dering the union of the two kingdoms more entire and compleat, 'it is, amongſt other things, enacted, That the juſtices of the peace 'in Scotland, may do, uſe, and exerciſe, over all perſons within 'their ſeveral bounds, whatever doth appertain to the office and 'truſt of a juſtice of peace, by virtue of the laws and acts of parlia-'ment made in England before the union, in relation to, or for

'the

‘ the preſervation of, the public peace; by virtue of which powers
‘ and priviledges, veſted in them for the purpoſes aforeſaid, they
‘ have ſufficient authority to receive information, concerning crimes
‘ committed within the reſpective counties, and to committ ſuch
‘ offenders, or take ſecurity or recognizance, and to do other ne-
‘ ceſſary acts, for the effectual proſecution of the ſaid crimes; in
‘ conſequence whereof, the old method of taking up dittay, and
‘ exhibiting informations againſt delinquents, by the ſtreſs and por-
‘ teous roll, as the ſame was grievous, is now become unneceſſary:
‘ Be it therefore enacted, by the authority aforeſaid, that, from and
‘ after the firſt day of May, the ſaid method of taking up dittay,
‘ and exhibiting information, by the ſtreſs, and porteous roll, ſhall
‘ be, and is hereby totally diſcharged and aboliſhed, to all intents
‘ and purpoſes whatſoever, any law or ſtatute to the contrary, in
‘ any wiſe, notwithſtanding: § 4. And be it further enacted, by the
‘ authority aforeſaid, that, informations, in order to making up of dit-
‘ tays, concerning crimes to be tried in the ſaid circuits in Scotland,
‘ from and after the firſt day of May next, ſhall be by preſentments
‘ to be made by the juſtices of peace, at their quarter ſeſſions, or
‘ upon informations to be taken by the ſherriffs, ſtewarts, baillies of
‘ regalitys, and their deputies; magiſtrates of boroughs, or other
‘ inferior judges and magiſtrates, within the juriſdiction of the re-
‘ ſpective circuits, concerning ſuch crimes as are to be tried before
‘ the Lords of Juſticiary, in their circuits, in the month of July and
‘ February yearly; and the ſaid juſtiees of peace, at leaſt two of them
‘ are hereby required and authoriſed, to meet at the head burgh of
‘ the reſpective ſhires, within which they are juſtices, and at the
‘ ordinary place and hour of meeting, upon the twenty firſt day of
‘ the ſaid months of July and February, reſpectively, yearly, being
‘ lawfull days, or, on the next lawful day thereafter, there to re-
‘ ceive ſuch informations as ſhall be offered, concerning matters cri-
‘ minal, to be tried in the circuits; and to reviſe ſuch informations
‘ as have been taken before the time of the ſaid meetings, by two
‘ or more of the juſtices of the peace, otherwiſe than at their quar-
‘ ter meetings: And the ſaid ſherriffs, ſtewarts, baillies of regalities,
‘ and their deputies; magiſtrates of boroughs, and other inferior
‘ judges and magiſtrates, reſpectively, ſhall meet upon the twenty
‘ ſecond days of the ſaid months of July and February reſpectively,
‘ yearly, being lawful days, or, on the next lawfull day thereafter,
‘ at the ordinary places and hour of their meetings, there to receive
‘ ſuch informations as ſhall be offered, concerning matters criminal,
‘ to be tried in the circuits; and the ſaid juſtices, ſherriffs, ſtewarts,
‘ baillies,

' baillies of regalities, and their deputies; magiſtrates of burghs, and ' other inferior judges and magiſtrates, are hereby required and au-' thoriſed, to make up particular accounts of ſuch criminal facts, ' happening within their reſpective bounds, as are to be tried before ' the reſpective circuits; containing the names and deſignation of ' the offenders, the facts committed, with the circumſtances of time ' and place, and others, that may ſerve to diſcover the truth; con-' taining alſo, the names and deſignations of the witneſſes, and titles ' of ſuch writes as are to be made uſe of at the trials; which infor-' mations are hereby appointed to be ſigned by the ſaid juſtices, or ' at leaſt two of them, and their clerk, or by the ſaid ſherriffs, ſtew-' arts, baillies of regalities, or their deputes, and clerks, or by the ' magiſtrates of burghs, or other inferior judges or magiſtrates and ' their clerks reſpectively; and, being ſo ſigned, the reſpective clerks ' are alſo hereby required and authoriſed, to tranſmitt the ſame, to-' gether with ſuch writes, or other evidence or proof, as are to be ' made uſe of in the trials, before the judges at the reſpective circuits, ' to the Lord Juſtice Clerk, or his deputies, at Edinburgh, at leaſt ' fourty days before the holding of the reſpective circuit courts, that, ' being given to her majeſties advocate, or ſuch as diſcharge that ' truſt in Scotland, libels and indictments may be raiſed and exe-' cuted againſt parties, aſſyſers, and witneſſes, according to the for-' mer laws and cuſtom.'

From the whole of theſe two clauſes of this act of parliament, it is plain, that the legiſlator did not underſtand, that, by the former act they had given authority to the juſtices of peace, to try crimes indiſcriminately themſelves; but, on the contrary, they had given them only a power of preparing matters, for trial of crimes at the circuit courts.

And, as it cannot be ſhown from any law, that the juſtices of peace, ſince the union, have got an explicit authority to try the crime of theft, the ſuſpender humbly apprehends, that the reaſoning that has been uſed, is concluſive to ſhow, that they have no ſuch power.

The ſuſpender will *next* proceed to the other point mentioned in the interlocutor of your Lordſhips, *viz.* Whether the juſtices could proceed in this complaint, without calling a jury? the diſcuſſion of this queſtion muſt be upon the ſuppoſal, that the juſtices are poſſeſſed of a juriſdiction to try the crime; for, if they are poſſeſſed of no juriſdiction to try the crime, all queſtions about the mode of proceeding are unneceſſary. The ſuſpender, therefore humbly hopes, that the diſcuſſal of this queſtion is

not a very material point, in this caſe. In obedience, however, to your Lordſhips interlocutor, he ſhall, as ſhortly as poſſible, ſtate ſuch arguments as occur to him, to ſhow, that, if they are poſſeſſed of ſuch a power, they muſt exerciſe it by a jury.

It is ſo well known a propoſition, that cauſes of all kinds were in antient times, tried by juries in Scotland, that it is unneceſſary to quote authorites in ſupport of it: even civil cauſes, before the inſtitution of the college of juſtice, were univerſally tried by a jury; and, that all criminal cauſes were ſo tried, we have the authority of almoſt all our lawyers. But, in place of entering into a multiplicity of opinions of this kind, it may be neceſſary, once for all, to refer to the 2 Chap. of the ſtatute of Alexander the II. which is intitled '*de capiendis indictametis et malefactoribus puniendis*;' from which it is plain, that all malefactors were, in thoſe days, tried by an aſſize.

And this continued long to be the law; for, even in the year 1634, it appears to have been made a queſtion, whether a criminal action, even when nothing more than a pecuniary unlaw was inſiſted for, could be referred to a parties oath, or tried otherwiſe than by a jury? to this purpoſe, there is a deciſion obſerved by Lord Durie 13. Feb. 1634, the bailie of Melroſe *contra* Darling, in the following words: 'One Darling being conveened before the bailie of the regality of 'Melroſe, at the inſtance of John Tait, and the procurator fiſcal 'for wounding of the ſaid John Tait, to the effuſſion of his blood; 'and the fact of blood, and blood wyte, being referred to the de-'fender's oath, Andrew Darling being then preſent in court, and 'refuſing to give his oath thereupon, decreet was given againſt him, 'convicting him; and therefore unlawing him in a particular ſum, 'for blood and blood wyte; which decreet being ſuſpended, on this 'reaſon, that the ſame is a null ſentence, ſeeing that the party is 'not, in law, holden to ſwear upon a criminal fact, and the judge 'ought not to put it to his oath, but only ought to have tried the 'ſame by an aſſize, and neither by oath, nor yet by witneſſes; for 'witneſſes might have been produced before the inqueſt to inform 'them, but the judge could not try it by witneſſes; and the moſt 'that the judge could do in ſuch a caſe, was to unlaw for contu-'macy, and not for the fact. The lords ſuſtained the decreet, not-'withſtanding of this reaſon, and found, that it might be tried by 'the parties oath, (or by witneſſes as ſome thought) ſeeing the 'party was perſonally preſent, and, for refuſing to give his oath, 'they found the ſentence well given; for he was not purſued for 'life or member, to incurr any criminal ſentence therefore, but 'but only for a pecunial unlaw which being to that end, might be 'tried by his oath; and in facts clandeſtinely done in the night, or

'where

'where there are few or none to qualify the ſame, trial, by the 'parties oath, with no reaſon ought to be refuſed, as isuſually 'done before the Lords of ſecret council.

In this deciſion, it appears to have been plainly the opinion of the court, that in all caſes, where any other puniſhment was concluded for, beſides a pecuniary fine or unlaw, a trial by jury was eſſentially requiſite, and there was no ſuch thing as a reference to oath of party; and this diſtinction, between a trial by jury, and a trial wherein reference, by oath of party, is allowed, will fall to be more particularly attended to, in a ſubſequent part of the argument.

It has been already obſerved, that, in the ſtatute 1597, chap. 82 which appoints certain commiſſioners and juſtices, in the furtherance of juſtice, peace and quietneſs, though the juriſdiction of theſe juſtices was limited to crimes of an inferior order, which were to be expreſſed in a particular table, yet their trial was to be by a jury, they being empowered to iſſue their precepts to ſherriffs, and officers at arms, to ſummon aſſizes for that purpoſe. This clearly ſhows what the ideas of theſe times were, as to the mode of proceeding in the trials, even of inferior kinds of crimes, *viz.* that they were all to be by a jury.

The ſuſpender hath already taken notice, of the difference between a trial by a jury, and a trial, where the alternative of a proof by witneſſes, or oath of party, was to be admitted. It is remarkable, that, in the 7th and 30th articles of the inſtructions, 1661, the juſtices are empowered to proceed, in the trial of the crimes mentioned, in theſe articles, in the way of reference to oath of party, and holding as confeſt; which being ſpecial, as to theſe articles, and not a general rule for all procedure before the juſtices, muſt be conſidered as an exception from the general rule of proceeding, which, therefore, muſt have been by trial by jury.

And this is farther ellucidated by the eight article of the act, wherein the juſtices are authoriſed to put his majeſties act of parliament in full execution, againſt wilfull beggars, vagabonds, and Egyptians. Now, the acts of parliament, relative to theſe, all make mention of tryal by jury. Thus by the ſtatute, 1579, chap. 74 'it is enacted, that 'all perſones, being above the aige of fourteene, and within the aige 'of three ſcoir and ten zeires, that heirafter ar declared and ſet 'foorth, be this act and ordour, to be vagaboundes, ſtrang and idle 'beggars, quhilkes ſall happen at any time heirafter, after the firſt 'day of Januar nixt to cum, to bee taken wandering, and miſordering themſelves, contrarie to the effect and meaning of thir pre'ſentes, ſall be apprehended, and, upon their apprehenſion, be 'brocht befoir the proveſt and baillies within the burgh; and, in

'everie

'everie parochin in Landwart befoir him that ſall be conſtitute juſ-
'ſtice, be the kings commiſſion, or be the lords of regality within
'the ſamen, to this effect; and be them to bee committed in waird,
'in the commoun priſon, ſtokkes, or irons, within their juriſdiction,
'there to be keeped, unlatten to libertie, or upon bande or ſovertie,
'quhill they be put to the knawledge of an aſſize, quhilk ſall be
'done within ſex days thereafter; and gif they happen to be con-
'victed, to bee adjudged to be ſcourged, and burnt throw the
'eare with ane hote iron.' And, in the after part of this act, ex-
plaining who are to be holden as falling within its ſanction, Egyp-
tians are particularly mentioned.

By another ſtatute, *viz.* 1609 Chap. 13. 'A proclamation of the
privy council is ratified, 'commanding the vagabonds, ſorners,
'and common thiefes, commonlie called *Egiptians*, to paſs forth of this
'kingdome, and remain perpetuallie forth thereof, and never to
'returne within the ſamin, under the pain of death; and that the
'ſamin have force and execution after the firſt day of Auguſt next
'to come: After the quhilk tyme, if any of the ſaids vagabounds,
'called *Egiptians*, as well women as men, ſhall be found within
'this kingdome, or any part thereof, it ſhall be leſome to all his
'majeſties goods ſubjects, or any ane of them, to cauſe take, appre-
'hend, impriſon, and execute to death, the ſaids Egiptians, either
'men or wemen, as common, notorious, and condemned theives,
'by ane aſſize only to be tried, that they are called knawn, re-
'put and halden Egiptians.'

In both theſe acts, it is clear, that the trial of Egyptians was to be by jury; and the juſtices being impowered to proceed againſt them, by puting in execution the acts of parliament, could try them no other way but by jury. This, therefore, is very explicit, with reſpect to one of the articles of the inſtructions, where no new form of procedure is pointed out; and finding them thus obliged to try by jury, in ſome of thoſe caſes, the ſound conſtruction of the law muſt be, that, unleſs where there is a ſpecial exception made, they are bound to adopt this mode of trial.

Of conſequence, ſuppoſing the ſtatute of Queen Ann to have authoriſed them to try thefts, they are bound to proceed by a jury, that being really the mode of trial, authoriſed by the law of Scotland, in juſtice of peace courts, before the union, unleſs where the law had made an explicit exception, which it had done in ſome few caſes.

And, that this was the conſtruction put upon the ſtatute, appears from this, that the form of commiſſions of the peace for Scotland,

was

was immediately reduced to the ſame ſtandard with that of commiſſions of the peace for England, and ever ſince have run in that form. The clauſe, with regard to the criminal juriſdiction, is as follows: 'We have alſo aſſigned you, and every two or more of 'you (of whom any one of you the aforeſaid A, B, C, D, &c. we 'will ſhall be one) our juſtices, to enquire the truth more fully, 'by the oath of good and lawful men of the aforeſaid county, by 'whom the truth of the matter ſhall be the better known, of all 'and all manner of felonies, poiſonings, inchantments, ſorcerers, 'art, magic, treſpaſſes, foreſtallings, regratings, ingreſſions, and 'extortions whatſoever; and of all and ſingular other crimes and 'offences, of which the juſtices of our peace may, or ought lawfully to enquire.' Doctor Burn, in his treatiſe, entitled, *the juſtice of peace and pariſh officer*, explains theſe words, 'by the oath of good 'and lawful men,' thus, that is by a jury ſworn. Thus, by the expreſs tenor of their commiſſion, they are required to try ſuch caſes no otherwiſe than by a jury.

The ſuſpender, therefore, humbly apprehends, that, in crimes of any importance, particularly thoſe falling under the determination of felony, the juſtices of the peace are not at liberty to proceed any other way than by jury. Hence, if it is to be ſuppoſed at all, that they have a juriſdiction to try the crime of theft, they muſt try that crime in this manner; and until a jury have found the perſon tried guilty, they cannot inflict any puniſhment.

And, if this was the caſe in proceedings before the juſtices of peace originally, there is no reaſon why the old law ſhould be departed from, but rather that it ſhould be enforced and ſtrengthened; for, the ſuſpender is ſorry to ſay, that, in later times, the bench of juſtices of peace is not more reſpectable than it was of old. In the original inſtitution, in 1587, the largeſt counties had no more than twenty one; a few of a large extent not more than fourteen, and the reſt only ſeven; in which laſt claſs, the counties of Elgin, Linlithgow, Edinburgh, Haddington, Berwick, &c. Counties very populous, and of conſiderable extent, were comprehended. There was, therefore, great room for choice; and benches of juſtices might be choſen, conſiſting of individuals all of high character, and great knowlege; yet, even at that time, it was not judged proper to diſpenſe with the ſolemn form of trial by jury, in criminal matters that fell under their juriſdiction. At this preſent time, the commiſſions of the peace contain a very great number of names, and every new commiſſion contains a ſtill greater number than the former ones. Who are the perſons, whoſe names thus croud the commiſſions? are they not thoſe nominal and fictitious free-holders, who are a diſgrace

to the political *influence* of this country; for, every perſon, as ſoon as he gets his name in the roll of free-holders, though he ſhould be obliged to keep it there, by ſwallowing oaths, which the niceſt caſuiſtry cannot reconcile to the conſciences of many, thinks he becomes immediately entitled to act as a judge and a magiſtrate, in the character of a juſtice of peace, and is grievouſly diſappointed if his name does not appear in the firſt commiſſion of the peace for the county. What can be expected from men who have become nominal free-holders, to job away the freedom of election of the legiſlative body, in ſo far as concerns the real free-holders, but that, when they become juſtices, they will job away the ſanctity of courts, and the purity of judges, to gratify their private paſſions and inclinations. Are theſe men to be entruſted with an unlimited power of puniſhment, without the ſecurity of a tryal by jury, which is impoſed as a check, in favour of the liberty of the ſubject, on the proceedings of the moſt auguſt criminal courts that the conſtitution recognizes? The ſuſpender ſpeaks of the power being in the hands of juſtices, ſuch as theſe he has mentioned; becauſe, wherever a job is to be driven, ſuch juſtices will form a majority, and men of ſentiment and integrity will be diſcouraged from attending courts, where all their efforts, to ſupport regularity and propriety of proceedings, cannot avail.

In England, juſtices of the peace are obliged to try all crimes, of any importance, by jury; yet, in England, the character of a juſtice of peace is a much more dignified one than with us. No man there, can be a juſtice of peace, unleſs he poſſeſſes an eſtate of L. 100. *per annum*, in the county where he is to exerciſe that office. With us, no qualification of that kind is required. In England, certain perſons are even excluded from acting in that office at all. In Scotland, the king may name every deniſon of Great Britain, who is a proteſtant, to be a juſtice of peace in every county, unleſs miniſters of the church of Scotland are excluded, by the ſtat. 1584. c. 133; And, of late, it hath been not uncommon to inſert the names of miniſters in the commiſſions of the peace, and for thoſe miniſters to accept of the office. In ſhort, while a conſiderable degree of knowledge and decorum remains among the juſtices of peace in England, there is but too much reaſon to dread, that thoſe in Scotland will become little better, than an ignorant, factious, and diſorderly rable. In ſuch circumſtances, it is apprehended, that, if they are to exerciſe criminal juriſdiction at all, they ought to exerciſe it under the ſtricteſt check of a verdict of a jury, unleſs, in thoſe caſes, where the law has ſpecially authoriſed them to proceed otherwiſe.

In reſpect whereof,

ANDREW CROSBIE.